

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 62708-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
GIOVANNI BAZAN,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>September 28, 2009</u>
)	
)	

Cox, J. — This court will only overturn a trial court’s denial of a motion for mistrial when there is a substantial likelihood that the error prompting the mistrial affected the jury’s verdict.¹ Because Giovanni Bazan cannot show that the actions of a courtroom security officer affected the jury’s verdict, we affirm the trial court’s denial of his motion for mistrial. But the State properly concedes that the trial court erred in entering orders that prohibit Bazan from contacting his minor children. The no-contact orders interfere with Bazan’s fundamental liberty interest in parenting his children and are not directly related to the circumstances of the crime for which he has been convicted. We therefore

¹ State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

vacate the sentence to that extent and remand to the trial court to strike those portions of the sentence prohibiting contact between Bazan and his minor children.

Bazan and the complaining witness in this case, T.K., have two children in common: a son, four-year-old M.B.K.; and a daughter, two-year-old G.B.K. Following a series of events at T.K.'s home in early June 2008, the State charged Bazan with second degree assault (domestic violence) and felony harassment (domestic violence).

Bazan moved for mistrial twice during his trial. In his second motion, he alleged that on the day T.K. testified, a courtroom security officer "came rushing back behind" the defense table at a time when T.K. was getting off the witness stand. Bazan also raised several other issues in his motion. The trial court denied the motion.

A jury found Bazan guilty of fourth degree assault (domestic violence) and felony harassment (domestic violence). As part of the judgment and sentence for felony harassment, the trial court imposed no-contact orders prohibiting Bazan from contacting T.K. or his children.

Bazan appeals.

MOTION FOR MISTRIAL

Bazan argues that the trial court abused its discretion in denying his motion for a mistrial based on his claim that, during trial, a security officer "rushed to physically interpose himself" between Bazan and the complaining

witness in the presence of the jury. He claims that this occurrence is analogous to cases in which defendants were shackled during the course of trial. We disagree.

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion.² A reviewing court will find abuse of discretion only when no reasonable judge would have reached the same conclusion.³ A trial court's denial of a motion for mistrial will only be overturned when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict.⁴ Further, "trial courts 'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'"⁵

In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the irregularity could be cured by an instruction.⁶ The trial court has wide discretion to cure trial irregularities.⁷

"A defendant in a criminal case is entitled to appear at trial free from all

² Rodriguez, 146 Wn.2d at 269 (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

³ Id. (quoting Hopson, 113 Wn.2d at 284).

⁴ Id. at 269-70 (quoting Russell, 125 Wn.2d at 85).

⁵ Id. at 270 (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

⁶ State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

⁷ Id.

bonds or shackles except in extraordinary circumstances.”⁸ This rule is to ensure a fair and impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3, and article I, section 22, of the Washington Constitution.⁹ Courts have recognized that restraining a defendant during trial infringes upon the right to a fair trial for several reasons, including the presumption of innocence.¹

Here, the record shows no evidence of shackling. More importantly, there is no evidence, other than Bazan’s bare allegation, that he was restrained or “impliedly restricted” during trial as he claims. The only factual assertion below was that the security officer came up behind the two defense attorneys and the defendant:

[Defense counsel]: [O]n October 29th, which is Wednesday, the day [T.K.] testified pretty much all day, at some point we either broke – we took a break, or we stopped for lunch. There was a point when [T.K.] was on the stand the Court indicated that we were going to take a break or take a short recess. She was getting off the stand, and I believe headed towards the door. And the officer . . . came rushing back behind me, behind Ms. Gibbs [other defense counsel] and stood about two or three feet away from Mr. Bazan.^[11]

Even accepting this representation as true, the details of the incident remain ambiguous. It is not clear that Bazan was ever restrained in any

⁸ State v. Clark, 143 Wn.2d 731, 772, 24 P.3d 1006 (2001).

⁹ Id. at 773.

¹ State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (citing State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981)).

¹¹ Report of Proceedings (November 3, 2008) at 15.

meaningful way. Defense counsel argued that the incident infringed upon Bazan's right to be presumed innocent. Beyond this statement, there is no indication in the record that the incident was of a sort that would have prejudiced the minds of the jurors against Bazan.

We also note that Bazan waited several days before calling the court's attention to this incident. Nothing in the record on the day T.K. testified, October 29, 2008, reflects its occurrence. Bazan first moved for mistrial on October 30, but did not bring up the incident. The first time any discussion of the incident appears in the record is in Bazan's second motion for mistrial, on November 3. In the context of prosecutorial misconduct, our supreme court has said that the absence of a motion for mistrial at the time of the allegedly improper argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial."¹² This principle is also relevant here, where Bazan had ample opportunity to raise the issue and request a curative instruction, but failed to do so until a motion several days after the fact.

Bazan has not shown a substantial likelihood that any error here affected the jury's verdict or that he was so prejudiced that nothing short of a new trial could insure that he would be tried fairly.¹³ The trial court did not abuse its discretion in denying Bazan's motion for mistrial

Bazan argues that the event at issue here is analogous to the improper

¹² State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

shackling found in State v. Finch¹⁴ and State v. Clark.¹⁵ We disagree.

In Finch, our supreme court found clear error where a defendant was shackled throughout his trial.¹⁶ The court explained that a trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury.¹⁷ That discretion must be founded upon a factual basis set forth in the record.¹⁸ Though the trial record indicated that the judge considered various reasons for restraining Finch, the facts did not indicate a “manifest need” for restraint.¹⁹ Nevertheless, the court confirmed Finch’s conviction, finding the error harmless because there was overwhelming evidence of his guilt.²

In Clark, the defendant was shackled when entering the jury auditorium on the first day of voir dire, in front of the entire jury venire.²¹ He was also

¹³ See Rodriguez, 146 Wn.2d at 269-70 (trial court’s denial of a motion for mistrial will only be overturned when there is a substantial likelihood that the error prompting the mistrial affected the jury’s verdict; trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly).

¹⁴ 137 Wn.2d 792, 975 P.2d 967 (1999).

¹⁵ 143 Wn.2d 731, 24 P.3d 1006 (2001).

¹⁶ Finch, 137 Wn.2d at 842, 861-62.

¹⁷ Id. at 846 (citing Hartzog, 96 Wn.2d at 400).

¹⁸ Id.

¹⁹ Id. at 851.

² Id. at 862.

²¹ Clark, 143 Wn.2d at 774.

shackled on the day the verdict was returned, but otherwise sat unrestrained during the trial.²² The trial court went through no individualized assessment of the need for shackling.²³ The supreme court concluded that the shackling was error, but the error was harmless beyond a reasonable doubt.²⁴ The court explained, “Because the impact of shackling on the presumption of innocence is the overarching constitutional concern, it would logically follow that in the minds of the jurors Clark’s shackling on the first day of voir dire was more than logically offset by over two weeks of observing Clark in the courtroom without shackles.”²⁵

Bazan argues that, as in Finch and Clark, there is no record here of a courtroom incident to allow an inference that he posed an escape risk or a danger to anyone present. He also argues that, as in those cases, the trial judge did not make the findings necessary to support the need for any restraining measures. But these similarities do not outweigh the most basic difference between the incident at Bazan’s trial and those in the cases above: the record here does not show that Bazan was shackled or even restrained. The circumstances here simply do not bear any relationship to the facts in those cases.

NO-CONTACT ORDER

²² Id. at 776.

²³ Id. at 774.

²⁴ Id. at 776.

²⁵ Id.

Bazan argues that the trial court's order preventing him from having any contact with his children for five years violates his fundamental liberty interest in the care and custody of his children. We agree, and the State properly concedes error on this issue.

RCW 9.94A.505(8) provides, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."²⁶

We review the imposition of crime-related prohibitions for an abuse of discretion.²⁷ Such conditions are usually upheld if reasonably crime related.²⁸ But "[m]ore careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right."²⁹ "Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order."³ Additionally, conditions that interfere with fundamental rights must be sensitively imposed, with "no

²⁶ RCW 9.94A.030(13).

²⁷ State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001) (citing State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)).

²⁸ State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009).

²⁹ Id.

³ Id.

reasonable alternative way to achieve the State's interest."³¹

In State v. Ancira,³² the no-contact order at issue prohibited all contact between the defendant and his children, although he was convicted only of domestic violence against his wife.³³ The court held that the order prohibiting contact with the children violated Ancira's fundamental right to parent his children because cutting off all contact was not reasonably necessary to protect them from the harm of witnessing domestic violence.³⁴ The court struck down the order because the children could be protected through indirect contact by phone or mail, or supervised visitation outside the presence of their mother.³⁵

Here, the jury returned a special verdict that count II, the felony harassment charge, did not occur within the sight or sound of T.K.'s minor children. Yet, in the judgment and sentence for felony harassment – domestic violence, the trial court imposed a five year order prohibiting Bazan from having contact with T.K., G.B.K., or M.B.K. The trial court also entered a separate order under RCW 10.99.050 prohibiting Bazan from contacting T.K., G.B.K., or M.B.K. until November 18, 2013. The misdemeanor assault judgment and sentence prohibits Bazan from contacting T.K.

As in Ancira, the record does not support the imposition of a no-contact

³¹ Id. at 32, 34-35.

³² 107 Wn. App. 650, 27 P.3d 1246 (2001).

³³ Id. at 652.

³⁴ Id. at 654.

³⁵ Id. at 654-55.

provision as to the children. The children were not witnesses to the harassment. The State failed to demonstrate that a total prohibition of contact, including indirect contact such as e-mail, mail, or telephone, was reasonable or necessary to protect the children from observing domestic violence.

Furthermore, because the jury expressly found that the harassment did not occur in the presence of a minor, the provisions of the no-contact orders preventing Bazan from contacting G.B.K. and M.B.K. are not directly related to the circumstances of that crime.

In addition, RCW 10.99.050 does not grant the sentencing court the power to prohibit contact greater than the power that exists under RCW 9.94A.505(8). Instead, RCW 10.99.050 provides, "When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim."

We affirm the defendant's conviction and remand for an order striking the provisions from the felony judgment and sentence and RCW 10.99 order that prohibit the defendant from having contact with his minor children.

Cox, J.

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WE CONCUR:

Edmonton, J.

Becker, J.